1992

# State of Utah v. Thomas C. Jackson : Brief of Appellee

Utah Court of Appeals


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IN THE UTAH COURT OF APPEALS

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| STATE OF UTAH,<br><br>Plaintiff/Appellant,<br><br>v.<br><br>THOMAS C. JACKSON,<br><br>Defendant/Appellee. | Case No. 920346-CA<br><br>Priority No. 15 |

# BRIEF OF APPELLEE

**********

AN APPEAL FROM A DISMISSAL OF FOURTEEN COUNTS OF THEFT, ALL CLASS B MISDEMEANORS, IN VIOLATION OF UTAH CODE ANN. § 76-6-404 (1990), IN THE SIXTH JUDICIAL DISTRICT COURT, GARFIELD COUNTY, STATE OF UTAH, THE HONORABLE DON V. TIBBS, PRESIDING.

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## JURISDICTION

The state claims to have jurisdiction in this case based on § 77-18a-1(2)(a) Utah Code Ann. However, the State has no right to appeal the case, since the Order appealed is an order of acquittal, rather than an order of dismissal. Since the State cannot appeal the decision, the Court does not have jurisdiction to hear this case.

## STATEMENT OF ISSUES AND STANDARD OF REVIEW

The state claims only one issue in this appeal. However, several issues must be addressed.

1. Is the State statutorily barred from bringing this appeal?
2. Is the appeal moot because the appeal brought by the State is in violation of the Double Jeopardy clauses of the Federal and State Constitutions?
3. Did the trial court properly grant Defendant's motion for a directed verdict pursuant to Rule 17(o) of the Utah Rules of Criminal Procedure and §77-17-3 of the Utah Code Annotated?

The jurisdictional questions raised in the first two issues are ones which must be addressed by the court before it can proceed to the merits. The Court of Appeals in Thompson v. Jackson, 743 P.2d 1230 (1987) held:

> The fundamental and initial inquiry of a court is always to determine its own jurisdictional authority over the subject matter of the claims asserted. Upon a determination by the Court that its jurisdiction is lacking, its authority extends no further than to dismiss the action.

The standard of review for questions of law would be one of correctness. City of Monticello v. Christensen, 788 P.2d 513, 516 (Utah 1990), cert. denied, 111 S.Ct. 120 (1990). However, no particular standard of review has been established for reviewing a trial court's decision directing a verdict in favor of the Defendant, pursuant to Rule 17(o) of the Utah Rules of Criminal Procedure and §77-17-3 of the Utah Code Ann., since these decisions are deemed acquittals by statute.

## STATEMENT OF THE CASE

This is an appeal from a dismissal of fourteen counts of theft, all class B misdemeanors, in violation of Utah Code Ann. § 76-6-404 (1990), in the Sixth Judicial District Court, in and for Garfield County, State of Utah, the Honorable Don V. Tibbs, presiding. (R. 84-89). At defendant's jury trial, counts I and II were dismissed with prejudice by stipulation (Order, R. 152, attached at Addendum A). Counts XVI and XVII were dismissed because evidence showed that property alleged to have been taken was inaccessible to defendant (R. 152-153; T. 200-02). The trial court granted Defendant's motion for a directed verdict on the

remaining counts, finding that the State failed to present believable evidence of intent to commit the theft (R. 153; T. 200-05).

## STATEMENT OF FACTS

1. The Court ordered the case dismissed based on insufficient evidence by the prosecution, particularly evidence relating to Defendant's unauthorized control of the property and the intent to permanently deprive. See, Addendum A.

2. The fourteen counts being appealed were derived from a statement given by Mr. Jackson to an officer that he had been authorized to take 6 to 9 gallons of diesel a week to cover his use of his personal vehicle. (T. 197-198).

3. The central question remaining in the case was whether Mr. Jackson had been actually authorized to take the fuel. Both the superintendent with authority to allow Mr. Jackson to take the fuel and the investigating officer testified that there was a possibility of a mistake on Mr. Jackson's part in believing that he was authorized. (T. 169, 196).

4. Faced with a substantial likelihood that the Defendant had been mistaken in believing he was authorized to take 6 to 9 gallons a week, the trial court granted Defendant's Motion to Dismiss at the close of the prosecution's case. (T. 204).

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Determinative constitutional provisions, statutes and rules are compiled in Addendum B. The applicable statutes are §76-1-403; §77-17-3 and §77-18a-1 of the Utah Code Annotated. The applicable

rule is Rule 17(o) of the Utah Rules of Criminal Procedure. The applicable constitutional provisions are the Fifth Amendment of the United States Constitution and Section 12 of the Utah Constitution.

## SUMMARY OF ARGUMENTS

The State does not have the right to appeal the acquittal of Mr. Jackson. A directed verdict for insufficient evidence at the close of the prosecution's case acts as an acquittal as defined in §76-1-403 of the Utah Code Ann. Acquittals are non-appealable.

In a similar vein, jeopardy attached when the jury was sworn and the evidence was presented. The subsequent acquittal, via the directed verdict, acts as a bar to the appeal under the State and Federal Constitutions.

Finally, the prosecution failed to produce believable evidence of the Defendant's intent to commit the crime of theft. Of the fourteen counts that were dismissed, only two counts involved any actual witnesses. The individual who could authorize the use of the fuel stated under oath that the Defendant could have been mistaken about his authorization to utilize company fuel. He also stated that he had authorized the Defendant to take fuel on at least one occasion and had authorized other workers to use hundreds of gallons of fuel during the same time period.

## ARGUMENT

### I.
### THE STATE HAS NO STATUTORY RIGHT TO APPEAL THE DISTRICT COURT'S ORDER.

The Order of the District Court acted as an acquittal, which the State does not have the right to appeal. The State is claiming

its right to appeal based on §77-18a-1(2)(a) of the Utah Code Ann., which states "An appeal may be taken by the prosecution from: (a) A final judgment of dismissal . . ."

The threshold question for determining whether the State can appeal the May 4, 1992 Order is whether the Order acts as a dismissal or an acquittal. The Utah Supreme Court in State v. Musselman, 667 P.2d 1061, 1064 (1983), stated:

> **The label attached to a ruling by a trial judge is not determinative of whether the termination of a criminal prosecution is an acquittal.** United States v. Scott, 437 U.S. 82, 96-97 (1980); United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). A ruling that constitutes a factual resolution in favor of the defendant on one or more of the elements of the offense charged is an acquittal. United States v. Scott, supra at 97; United States v. Martin Linen Supply Co., supra at 571.
>
> In the instant case, **the trial court 'dismissed' the theft charges because of its determination that there was inadequate proof of the requisite intent to commit the crime charged. Although the ruling was labeled a 'dismissal' by the trial court, it was clearly based on the trial court's assessment of the evidence and is an acquittal and not a 'dismissal' as that term is used in ^U 71-35-26(c).** See United States v. Scott, supra; United States v. Martin Linen Supply Co., supra. The State's appeal of the theft counts must, therefore, be dismissed because **an acquittal is not appealable.** Cf. State v. Davenport, 30 Utah 2d 298, 517 P.2d 544 (1973); State v. Overson, 26 Utah 2d 313, 489 P.2d 110 (1971).

(emphasis added).

The statutory definition of "acquittal" is found in §76-1-403(2) of the Utah Code Ann. The statute states:

> (2) **There is an acquittal** if the prosecution resulted in a finding of not guilty by the trier of facts or **in a determination that there was insufficient evidence to warrant conviction. . . .**

(emphasis added). An acquittal is not narrowly defined to include

only a finding of not guilty by the trier of fact An acquittal also occurs when a determination is made that there is insufficient evidence to warrant the conviction. The Order signed by the District Court specifically sets forth the grounds for acquitting Mr. Jackson: "[T]he Court is of the opinion that the State **failed to present sufficient evidence** to make out a prima facie case on any of the remaining counts of the information." (emphasis added).

The Court's May 4, 1992 Order was based on Rule 17(o) of the Utah Rules of Criminal Procedure. Rule 17(o) states:

> (o) At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the ***evidence is not legally sufficient to establish the offense charged*** or any lesser included offense.

(emphasis added). The applicable statutory provision is §77-17-3 of the Utah Code Ann. which contains similar language:

> When it appears to the court that **there is not sufficient evidence** to put a defendant to his defense, it shall forthwith order him discharged.

(emphasis added).

The Court's Order, the applicable rule and the applicable statute allowing the court to make the acquittal ruling, state that the ground for a directed verdict is for insufficient evidence. Under the definition in §76-1-403(2), the Court's Order was an acquittal, which cannot be appealed.

The State, in its brief, makes various arguments about the strength of the trial court's finding of insufficient evidence. This is not relevant. "Section 77-35-26(c) [currently §77-18a-1] does not authorize the State to appeal an acquittal, no matter how

overwhelming the evidence against the defendant may be." Musselman, at 1065.

## II.

## THE STATE'S APPEAL VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE U.S. AND UTAH CONSTITUTIONS

In conjunction with the fact that the state is statutorily barred from appealing the trial court's Order, this appeal violates the double jeopardy clause of the U.S. and Utah Constitutions. Jeopardy attached when the jury was sworn and evidence was presented. The very issue before the Court in this case was presented in State v. Musselman, supra, at 1065:

> An appellate court, on principles deeply rooted in the double jeopardy clauses of the Utah and Federal constitutions, and by the very nature of the judicial process itself, may not reassess an acquittal even though the acquittal was made under an incorrect application of the law or an improper determination of the facts. United States v. Martin Linen Supply Co., supra. Once a criminal charge has resulted in an acquittal by the trier of fact, the prohibition against double jeopardy prevents that determination from ever again being challenged. **It is of no consequence that the determination was made as a matter of law by a directed verdict of acquittal, ^X2 or as a matter of fact by the trier of fact.** See, e.g., Tibbs v. Florida, 457 U.S. 31, 41 (1982); United States v. Martin Linen Supply Co., supra; United States v. Ball, 163 U.S. 662 (1896). ^X3 Furthermore, for an appellate court to render an opinion on appeal from an acquittal would be to render an advisory opinion, which is beyond our power. See State v. Overson, supra.

(emphasis added). See, also, State v. Chugg, 749 P.2d 1279 (1988) [Appeal can't be taken from a directed verdict in a DUI case].

Even the case most heavily relied on by the State in their brief was merely an advisory opinion. State v. Thatcher, 157 P.2d 258 (1946) involved a directed verdict based on the insufficient

evidence of recklessness by the Defendant. The case ended in the following words:

> This being an appeal by the state in a criminal case, the case is reversed but the trial court is directed to proceed no further.

State v. Thatcher, 157 P.2d 258, 262 (1945). The current position of the appellate courts is to not issue such advisory opinions when the case before them is moot on account of the double jeopardy clauses. See, Musselman, at 1065; Chugg, at 1280; and State v. Overson, 489 P.2d 110 (1971).

Both the Chugg and Musselman decisions dealt with appeals from directed verdicts in a bench trial. The Thatcher decision involved a directed verdict in a jury trial. The mere fact that a directed verdict came in bench trial, rather than in jury trial, is of no consequence in relation to double jeopardy considerations. The grounds for a directed verdict made pursuant to Rule 17(o) of the Utah Rules of Criminal Procedure are the same for bench trials and jury trials. As stated earlier in Musselman, "[i]t is of no consequence that the determination was made as a matter of law by a directed verdict of acquittal, or as a matter of fact by the trier of fact." Musselman at 1065.

This appeal of Mr. Jackson's acquittal is in violation of the double jeopardy clauses of the Federal and State Constitutions as defined in the Musselman case. The case law is clear that a directed verdict by the trial court in a criminal case, when based on a finding of insufficient evidence, is an acquittal and non-appealable.

## III.

## THE COURT RULED PROPERLY IN FINDING THAT THE STATE HAD FAILED TO PROVIDE SUFFICIENT BELIEVABLE EVIDENCE TO PUT THE DEFENDANT TO HIS DEFENSE

As stated earlier, §77-17-3 and Rule 17(o) set forth the guidelines in determining whether or not the trial court should direct a verdict at the close of the prosecution's case. In State v. Emmett, 184 Utah Adv. Rep. 34 (Utah 1992), the Supreme Court restated the statutory grounds for review in a motion to dismiss:

> When a motion for a directed verdict is made at the close of the State's case, the trial court should dismiss the charge if the State did not establish a prima facie case against the defendant by producing 'believable evidence of all the elements of the crime charged.'

The situation in the case currently before the court was that the prosecution had failed to present any believable evidence upon which a reasonable jury could find that a crime had been committed. Of the fourteen counts which are at issue in this appeal, only two involve witnesses. The first occasion involved two witnesses who saw the Defendant with the hose in his hand. (T. 87, 115). One witness to this event stated that he had no personal knowledge, even after seeing Mr. Jackson with the hose, that any diesel fuel had been taken. (T. 121). The other witness also stated that she had no personal knowledge, despite what she had witnessed, that Mr. Jackson took any fuel (T. 100). The witness stated that checking the nozzle was part of Mr. Jackson's job as a security guard (T. 98-99). She also stated that it was mechanically impossible for the nozzle she witnessed Mr. Jackson holding to have fit his truck's tank (T. 101). Finally, the witness testified that she couldn't

hear a pump running and it was impossible to get fuel without the pump running (T. 104).

The questionable value of this testimony becomes even more ridiculous, when it is not even tied to a specific count in the information. No exact date or time, just a general time period, was obtained from the witnesses. The fact that Mr. Jackson had a nozzle in his hand (which didn't fit his gas tank) was nothing out of the ordinary. It was part of his job as security officer on the Burr Trail to check on whether or not equipment had been tampered with.

The other eyewitness occasion was the planned event by Mr. Haws. *In his testimony, he stated that he didn't want any action* taken until he could catch Mr. Jackson in the act, which he said he did a week later (T. 167). Mr. Haws was also the only individual on the job site who could authorize the use of diesel fuel. In the same time period that Mr. Jackson was charged with theft of less than 140 gallons of diesel, over 2,577 gallons of gasoline were used by other employees for their personal vehicles (T. 169). Mr. Haws testimony on recross is particularly telling:

> Q The standard company rule, I mean if there was a general rule and we could put it down in writing would be: You used your vehicle for company use, talk to you, you got gas; is that right?
>
> A Um-hum.
>
> Q To shorten it down, it would be if you use your personal vehicle for company use, you get gas; is that the rule?
>
> A If they go through me, yes.
>
> . . .
>
> Q Okay. All you can tell the Court is that Mr. Jackson might have had a mistaken assumption; is that right?

A Yes.

Q But if he assumed wrongly, it wouldn't be criminal, would it?

A It wouldn't be. But--

Q Okay. And he offered to pay you back because he was sorry about the mistake; right?

A Yes

(T. 169-170). Mr. Haws, in his earlier testimony, could recall no instance in which he actually informed him of the company policy (T. 139). It was faced with this weak testimony that the trial court found that no believable evidence had been presented that Mr. Jackson had committed the crime of theft (T. 203-204).

Finally, the State in their brief, rely on the judge's statement that even if the jury were to convict the defendant, it would feel compelled to grant a motion to dismiss after the completion of the case because of the insufficient evidence (T. 204). This statement by the court is not an admission that a reasonable jury could find Mr. Jackson guilty, but an appropriate rendition of the law set forth in §77-17-3.

Although the finding of a directed verdict is a matter of law for the trial court, by necessity, the court must rule on the believability of the evidence presented to that point. See, §77-17-3 and Rule 17(o). The evidence in this case was so weak and watered down that no believable evidence was presented to prove intent. The trial court was merely fulfilling its statutory duty.

## CONCLUSION

Defendant/Appellee respectfully requests that the court find that the State has no right to make this appeal and that the appeal is in violation of the double jeopardy clause of the State and Federal Constitutions. Furthermore, the trial court was acting within its statutory powers when it properly dismissed the fourteen counts.

Submitted this 15th day of January, 1993.

/S/

E. Kent Winward
Counsel for Defendant/Appellee

Certificate of Mailing

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Kenneth A. Bronston, Assistant Attorney General, attorney for appellant, 236 State Capital, Salt Lake City, Utah 84114 on the 19th day of January, 1993.

/S/

**ADDENDUM A**

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IN THE SIXTH JUDICIAL DISTRICT COURT OF GARFIELD COUNTY

STATE OF UTAH

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|---|---|---|
| THE STATE OF UTAH, | ) | |
| Plaintiff, | ) | ORDER |
| vs. | ) | |
| TOM JACKSON, | ) | Criminal No. 91-CR-309 |
| Defendant. | ) | |

This matter came before the Court for jury trial on the 19th day of March, 1992, the Honorable Don V. Tibbs presiding. Defendant was present in Court and was represented by his attorney, E. Kent Winward. The State of Utah was represented by Wallace A. Lee, Garfield County Attorney.

By stipulation of Counsel, Counts I and II of the information were dismissed with prejudice. After the jury was impaneled and sworn, the Court and jury heard opening statements of counsel and testimony of witnesses for the State of Utah. After the State of Utah rested its case, Defendant moved for dismissal of Counts XVI and XVII, and the motion was granted because during the period of time covered by these two counts, the fuel tank and equipment at

the site were locked, and Defendant could not have taken fuel from them.

After the Court dismissed Counts XVI and XVII, the Defendant moved for a directed verdict on the remaining counts. After hearing arguments of Counsel relative to the motion for directed verdict, the Court is of the opinion that the State failed to present sufficient evidence to make out a prima facie case on any of the remaining counts of the information. Specifically, the Court finds that the State of Utah did not present a prima facie case that Defendant took unauthorized control over the property of another with a purpose to deprive him thereof.

NOW THEREFORE, Defendant's motion for a directed verdict is granted and this case is hereby dismissed with prejudice.

DATED this 30th day of April, 1992.

BY THE COURT:

DON V. TIBBS,
District Court Judge

ADDENDUM B

**76-1-403. Former prosecution barring subsequent prosecution for offense out of same episode.**

(1) If a defendant has been prosecuted for one or more offenses arising out of a single criminal episode, a subsequent prosecution for the same or a different offense arising out of the same criminal episode is barred if:

(a) The subsequent prosecution is for an offense that was or should have been tried under Subsection 76-1-402(2) in the former prosecution; and

(b) The former prosecution:

(i) resulted in acquittal; or

(ii) resulted in conviction; or

(iii) was improperly terminated; or

(iv) was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

(2) There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of facts or in a determination that there was insufficient evidence to warrant conviction. A finding of guilty of a lesser included offense is an acquittal of the greater offense even though the conviction for the lesser included offense is subsequently reversed, set aside, or vacated.

(3) There is a conviction if the prosecution resulted in a judgment of guilt that has not been reversed, set aside, or vacated; a verdict of guilty that has not been reversed, set aside, or vacated and that is capable of supporting a judgment; or a plea of guilty accepted by the court.

(4) There is an improper termination of prosecution if the termination takes place before the verdict, is for reasons not amounting to an acquittal, and takes place after a jury has been impanelled and sworn to try the defendant, or, if the jury trial is waived, after the first witness is sworn. However, termination of prosecution is not improper if:

(a) The defendant consents to the termination; or

(b) The defendant waives his right to object to the termination;

(c) The court finds and states for the record that the termination is necessary because:

(i) It is physically impossible to proceed with the trial in conformity with the law; or

(ii) There is a legal defect in the proceeding not attributable to the state that would make any judgment entered upon a verdict reversible as a matter of law; or

(iii) Prejudicial conduct in or out of the courtroom not attributable to the state makes it impossible to proceed with the trial without injustice to the defendant or the state; or

(iv) The jury is unable to agree upon a verdict; or

(v) False statements of a juror on voir dire prevent a fair trial.

**History:** C. 1953, 76-1-403, enacted by L. 1973, ch. 196,

**77-17-3. Discharge for insufficient evidence.**

When it appears to the court that there is not sufficient evidence to put a defendant to his defense, it shall forthwith order him discharged.

**History:** C. 1953, 77-17-3, enacted by L. 1980, ch. 15, 2.

**77-18a-1. Appeals - When proper.**

(1) An appeal may be taken by the defendant from:

(a) the final judgment of conviction, whether by verdict or plea;

(b) an order made after judgment that affects the substantial rights of the defendant;

(c) an interlocutory order when upon petition for review the appellate court decides the appeal would be in the interest of justice; or

(d) any order of the court judging the defendant by reason of a mental disease or defect incompetent to proceed further in a pending prosecution.

(2) An appeal may be taken by the prosecution from:

(a) a final judgment of dismissal;

(b) an order arresting judgment;

(c) an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial;

(d) a judgment of the court holding a statute or any part of it invalid;

(e) an order of the court granting a pretrial motion to suppress evidence when upon a petition for review the appellate court decides that the appeal would be in the interest of justice; or

(f) an order of the court granting a motion to withdraw a plea of guilty or no contest.

**History: C. 1953, 77-18a-1, enacted by L. 1990, ch. 7, 10.**

**Compiler's Notes.** - This chapter recodifies Subsections (2), (3), and (9) of former Section 77-35-26, which is Rule 26 of the Utah Rules of Criminal Procedure. For notes to cases construing that rule, see the Court Rules volume.

**Effective Dates.** - Laws 1990, ch. 7, 12 makes the act effective on July 1, 1990.

(o) At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

## AMENDMENT V

**[Criminal actions - Provisions concerning - Due process of law and just compensation clauses.]**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Sec. 12. [Rights of accused persons.]**

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

History: Const. 1896.

Cross-References. - Rights of defendants, statutory provisions, 77-1-6.